

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CAREL INNIS,

Plaintiff,

v.

Z. PIEKARSKI, LVMPD,

Defendants.

Case No. 2:24-cv-00395-RFB-EJY

ORDER

Pending before the Court is Plaintiff's Application to Proceed *in forma pauperis* ("IFP"), which was prepared on the Clark County, District Court form but which nonetheless includes all of the information required by the U.S. District Court for the District of Nevada. ECF No. 1. The IFP application is granted.

I. Screening Standard

Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and may only dismiss them "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

In considering whether the complaint is sufficient to state a claim, all allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. *Wylar Summit P'ship*

1 *v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the
 2 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide
 3 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 4 A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is clear the
 5 complaint's deficiencies could not be cured through amendment, a *pro se* plaintiff should be given
 6 leave to amend the complaint with notice regarding the complaint's deficiencies. *Cato v. United*
 7 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

8 **II. Plaintiff's Complaint**

9 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
 10 that a right secured by the Constitution or laws of the United States was violated, and (2) that the
 11 alleged violation was committed by a person acting under color of state law. *West v. Atkins*, 487
 12 U.S. 42, 48 (1988). General allegations of wrongdoing in the absence of an identified claim does
 13 not satisfy these requirements. *Id.* Because § 1983 "is not itself a source of substantive rights," but
 14 merely provides "a method for vindicating federal rights elsewhere conferred," the first step is to
 15 identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271
 16 (1994) (internal quotations omitted).

17 Rule 8 of the Federal Rules of Civil Procedure requires a complaint to plead not only
 18 sufficient facts to give a defendant fair notice of the claims against him, but also the grounds upon
 19 which it rests. *Yamaguchi v. United States Department of the Air Force*, 109 F.3d 1475, 1481 (9th
 20 Cir. 1997) (citations omitted). "[A] pleading may not simply allege a wrong has been committed
 21 and demand relief." *Sherrell v. Bank of Am., N.A.*, Case No. CV F 11-1785-LJO (JLT), 2011 WL
 22 6749765, at *4 (E.D. Cal. Dec. 22, 2011).

23 Here, Plaintiff's Complaint alleges she was in handcuffs when searched by two Las Vegas
 24 Metropolitan Police Department ("LVMPD") Officers (Officer Piekarski and a second officer whose
 25 name is apparently not known). Plaintiff states she asked that a female officer search her; however,
 26 the male officers continued the search placing their hands under her t-shirt and bra claiming no
 27 female officer was available. Plaintiff says after the search, the Defendant officers called for a
 28 female officer. Plaintiff asserts a Fourth Amendment violation based on these facts.

1 In determining the reasonableness of a search under the Fourth Amendment, the Court must
 2 balance “the need for the particular search against the invasion of personal rights that the search
 3 entails.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Specific to Plaintiff’s Complaint, the Court
 4 located no case finding a pat-down search of a woman by a male officer is a *per se* violation of the
 5 Fourth Amendment. As one district court in the Ninth Circuit stated: “no court has held that there
 6 is a constitutional right to a same-sex search where the search does not involve a strip search. In
 7 fact, several courts have held to the contrary.” *Zayas v. Ortega*, Case No. 17-cv-02739-EMC, 2018
 8 WL 11227735, at *10 (N.D. Cal. Aug. 10, 2018) *citing* *Le v. Bava*, No. C15-1165JLR, 2016 WL
 9 3003224, at *5, ... (W.D. Wash. May 20, 2016) (stating that “there is no constitutional right to be
 10 searched by an officer of the same sex”). Further, “[t]he Ninth Circuit has explicitly recognized that
 11 ‘not every truthful allegation of sexual bodily intrusion during an arrest is actionable as a violation
 12 of the Fourth Amendment[;] [s]ome bodily intrusions may be provably accidental or *de minimis* and
 13 thus constitutionally reasonable.’” *Id.* at *11 *quoting* *Fontana v. Haskin*, 262 F.3d 871, 880 (9th
 14 Cir. 2001). *But see* *Nichols v. City of San Jose*, Case No. 14-cv-03383-BLF, 2017 WL 1398410, at
 15 *9 (N.D. Cal. Apr. 19, 2017) (denying summary judgment to defendant because plaintiff testified
 16 that defendant's conduct was “sexual in nature.” The officer did a second search of plaintiff in which
 17 he “unzipped her jacket, rubbed the skin around her waist, stomach, and back, and touched around
 18 her breasts with ‘the full hand’” for what seemed like minutes; plaintiff also claimed that, when
 19 defendant slammed her against the hood of the police car, it felt as if he were aroused).

20 As pleaded, Plaintiff’s Complaint fails to allege sufficient facts to show she suffered a Fourth
 21 Amendment violation. While it is clear Plaintiff was understandably uncomfortable with the search
 22 performed, the facts as stated do not demonstrate the search of Plaintiff by male officers was
 23 constitutionally unreasonable under the circumstances.

24 **III. Order**

25 Accordingly, IT IS HEREBY ORDERED that Plaintiff’s Application to proceed *in forma*
 26 *pauperis* (ECF No. 1) is GRANTED.

27 IT IS FURTHER ORDERED that Plaintiff’s Complaint (ECF No. 1-1) is DENIED without
 28 prejudice and with leave to amend.

1 IT IS FURTHER ORDERED that if Plaintiff chooses to file an amended complaint, she must
2 do so no later than **April 19, 2024**. Plaintiff's amended complaint must be titled First Amended
3 Complaint and must be filed on the Court's Civil Rights Complaint form. Plaintiff must assert all
4 facts—sufficient facts to state a Fourth Amendment Claim as described above—against each of the
5 defendant she seeks to sue. Plaintiff must also identify the cause or causes of action she seeks to
6 assert. If Plaintiff files a first amended complaint the complaint must be complete in and of itself.
7 The Court cannot refer to Plaintiff's original Complaint for any purpose when determining if the
8 first amended complaint states a claim that may proceed in federal court.

9 IT IS FURTHER ORDERED that the Clerk of Court must send Plaintiff the Court's form
10 Civil Rights Complaint and the instructions for filing the same.

11 IT IS FURTHER ORDERED that Plaintiff's failure to comply with the terms of this Order
12 may result in a recommendation that this action be dismissed without prejudice.

13 Dated this 4th day of March, 2024.

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16 ELAYNA J. YOUCHAK
17 UNITED STATES MAGISTRATE JUDGE
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